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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION

Nehemiah Kong,

Plaintiff,

vs.

Gradiazio Investment Company;
Barchester Temple City, L.P., a
California Limited Partnership; Bar-CA
Independent I, Inc., a California
Corporation; Garfield Beach CVS,
L.L.C., a California Limited Liability
Company; and Does 1-10,

Defendants.

CASE NO. 2:18-cv-06271-AB-SS

**DEFENDANTS' MEMORANDUM
OF POINTS AND AUTHORITIES
IN SUPPORT OF MOTION FOR
PARTIAL SUMMARY JUDGMENT
AND REQUEST TO DECLINE
SUPPLEMENTAL JURISDICTION**

The Hon. André Birotte Jr.

Date: October 4, 2019

Time: 10:00 a.m.

Ct. Rm.: 7B

Trial Date: January 28, 2020

Action Filed: July 20, 2018

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DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR PARTIAL
SUMMARY JUDGMENT AND REQUEST TO DECLINE SUPPLEMENTAL JURISDICTION

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MEMORANDUM OF POINTS & AUTHORITIES

I. INTRODUCTION

Plaintiff Nehemiah Kong (“Plaintiff”) has brought suit against several defendants alleging violations of the Americans with Disabilities Act and the California Unruh Civil Rights Act. Defendants Barchester Temple City, L.P., (“Barchester”), Bar-CA Independent I, Inc. (“Bar-CA”), and Garfield Beach CVS, LLC (“Garfield Beach CVS”) (collectively “Defendants”) bring this motion on three grounds.

First, as to Plaintiff’s claims that relate to property not owned or controlled by Defendants (such as those related to the accessible parking spaces in front of the Icho Izakaya store and the East West Bank), Plaintiff cannot obtain injunctive relief from this Court because he has not joined all of the proper parties to this action and the prosecution of these claims against Defendants is improper.

Second, Plaintiff’s claim for injunctive relief against Defendants must be dismissed as moot because every barrier alleged in Plaintiff’s First Amended Complaint that relates to the property over which Defendants have ownership or control in this action do not currently exist. All of the cross slopes and/or running slopes of the two accessible parking spaces and their access aisle located directly in front of a CVS store presently comply with current accessibility standards under federal and state law. Additionally, the plumbing underneath the restroom sink in the subject CVS store is presently wrapped with insulation to prevent burn contact, in compliance with accessibility standards under state and federal law.

Third, the Court should decline to exercise supplemental jurisdiction over Plaintiff’s state law claim because doing so would promote the values of fairness and comity, Plaintiff’s state claim raises novel and complex issues of state law, Plaintiff’s state claim substantially predominates over his federal claim, and state court would provide a more efficient forum for Plaintiff’s state law claim. Based on all of the foregoing, Defendants are entitled to summary judgment in their favor.

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1 **II. FACTUAL BACKGROUND**

2 **A. The Parties**

3 Plaintiff alleges that he is a paraplegic who suffers from Polio and uses a
4 wheelchair for mobility. [SUMF 1] (First Amended Complaint [“FAC”] ¶ 1, ECF
5 No. 34).

6 Defendant Barchester owns the property located at 5585 N. Rosemead Blvd.,
7 Temple City, California (the “Property”). [SUMF 2] (Declaration of Joseph
8 Seravalli (“Seravalli Decl.”) ¶ 2.) Defendant Bar-CA is a General Partner of
9 Barchester but does not own or have control over the Property. [SUMF 3] (Seravalli
10 Decl. ¶ 3.) The Property is limited to the parcel of land upon which the subject CVS
11 store and its parking spaces are located. [SUMF 4] (Seravalli Decl. ¶ 4.) Barchester
12 does not own or control any other property in the shopping center identified in
13 Plaintiff’s FAC other than the Property. [SUMF 5] (Seravalli Decl. ¶ 5.)

14 Defendant Barchester leases the Property to Garfield Beach CVS. [SUMF 6]
15 (Seravalli Decl. ¶ 8; Exhibit B to Seravalli Decl.; Declaration of Lori Marchetti
16 (“Marchetti Decl.”), ¶ 2; Exhibit A to Marchetti Decl.) Garfield Beach CVS does
17 not occupy or control any other property in the shopping center identified in
18 Plaintiff’s FAC other than the Property. [SUMF 7] (Marchetti Decl., ¶ 4.)

19 **B. Plaintiff’s Allegations**

20 Plaintiff filed his original complaint (“Complaint”) against Defendants on
21 July 20, 2018 for violations of the Americans with Disabilities Act (“ADA”) and
22 California Unruh Civil Rights Act (“UCRA”). [SUMF 8] (ECF No. 1.) In
23 approximately October 2018, defense counsel notified Plaintiff’s counsel that
24 Defendants did not occupy or control property at the subject shopping center other
25 than the Property upon which the CVS Store and its related parking spaces were
26 located. [SUMF 9] (Declaration of Kelley Fox, ¶ 2.) On November 14, 2018,
27 Plaintiff filed the FAC adding Gradiazio Investment Company (“Gradiazio”) as a
28 defendant. [SUMF 10] (ECF No. 34.) Plaintiff’s FAC alleges that Gradiazio owns

1 the real property upon which the East West Bank (located at 5607 N. Rosemead
2 Blvd., Temple City, California) is located. [SUMF 11] (FAC ¶3.) Gradiazio was
3 dismissed from this action on January 9, 2019. [SUMF 12] (ECF No. 46.)

4 In the FAC, Plaintiff alleged that he went to a shopping center on an
5 unspecified date in July 2018 to shop at a CVS Store and bank at the East West
6 Bank. [SUMF 13] (FAC ¶ 12.) Plaintiff alleged that when he visited the shopping
7 center, the following architectural barriers existed:

8 Claim 1: Even though there were two parking spaces marked and reserved
9 for persons with disabilities directly in front of CVS during
10 Plaintiff's visit, the parking stalls and access aisles reserved for
11 persons with disabilities were not level with each other and had
12 slopes greater than 2.1%; [SUMF 14] (FAC ¶ 15-16);

13 Claim 2: The plumbing underneath the CVS restroom sink is not wrapped to
14 protect against burning contact; [SUMF 15] (FAC ¶ 25);

15 Claim 3: Because of the configuration and location of the parking spaces for
16 persons with disabilities in front of the Icho Izakaya store,
17 customers using most of those parking are required to travel behind
18 parked cars and travel in the vehicular drive path to reach the
19 nearest, accessible path of travel back to CVS; [SUMF 16] (FAC
20 ¶18);

21 Claim 4: The parking space marked and reserved for persons with
22 disabilities directly in front of the East West Bank also has a curb
23 ramp running into the parking stall and access aisle, which creates
24 slopes greater than 2.1%; [SUMF 17] (FAC ¶ 19-20).

25 As discussed in detail below, Plaintiff's federal claim against Defendants
26 must fail because all alleged barriers in Plaintiff's FAC that are on the Property are
27 moot, warranting the dismissal of Plaintiff's remaining state law claim and, thus, the
28 granting of this motion.

1 **III. LEGAL ARGUMENT**

2 **A. Summary Judgment**

3 Summary judgment is appropriate when it is demonstrated that no genuine
4 issue as to any material fact exists, and that the moving party is entitled to judgment
5 as a matter of law. *Federal Rule of Civil Procedure* 56(c)¹; *Chapman v. Stations,*
6 *Inc.*, 2011 U.S. Dist. LEXIS 114750 at *5 (E.D. Cal. 2011). The moving party
7 initially bears the burden of proving the absence of a genuine issue of material fact.
8 *In re Oracle Corp. Securities Litigation*, 627 F.3d 376, 387 (9th Cir. 2010). If this
9 burden is sustained, "the burden then shifts to the non-moving party to designate
10 specific facts demonstrating the existence of genuine issues for trial." *Id.*

11 **B. Plaintiff's Prima Facie Case Under the ADA**

12 Title III of the ADA prohibits discrimination on the basis of disability in the
13 "full and equal enjoyment of the goods, services, facilities, privileges, advantages,
14 or accommodations of any place of public accommodation." 42 U.S.C. § 12182(a);
15 *Oliver v. Ralphs Grocery Co.*, 654 F.3d 903, 904 (9th Cir. 2011). Discrimination
16 includes the "failure to remove architectural barriers . . . that are structural in nature,
17 in existing facilities . . . where such removal is readily achievable." 42 U.S.C. §
18 12182(b)(2)(A)(iv). Under Title III the ADA, a plaintiff may only obtain injunctive
19 relief (i.e., removal of the alleged barrier) and is not entitled to monetary damages.
20 42 U.S.C. § 12188(a)(1); *Oliver*, 654 F.3d 903 at 905; *Wander v. Kaus*, 304 F.3d
21 856, 858 (9th Cir. 2002). As such, "a defendant's voluntary removal of alleged
22 barriers prior to trial can have the effect of moot[ing] [an] ADA claim." *Oliver*, 654
23 F.3d 903 at 905; *see also Chapman v. Starbucks Corp.*, 2011 U.S. Dist. LEXIS 3570
24 at*11 (E.D. Cal. 2011); *Stevey v. 7-Eleven, Inc.*, 2009 U.S. Dist. LEXIS 53801, *26-
25 *27 (E.D. Cal. 2009) ("Because a private ADA plaintiff is limited to seeking

26 _____
27 ¹ All further code references are to the Federal Rules of Civil Procedure unless
28 otherwise stated.

1 injunctive relief and attorney’s fees... a plaintiff’s ADA claim is moot if the
 2 defendant makes the precise alterations or accommodations that the plaintiff sought
 3 to require with an injunction”).

4 To establish a *prima facie* case for injunctive relief under the ADA, a plaintiff
 5 must establish: (1) Plaintiff is a qualified individual with a disability; (2) Defendants
 6 owned, leased, or operated a place of public accommodation; (3) the place of public
 7 accommodation was in violation of one or more construction-related accessibility
 8 standards; and (4) the violations denied Plaintiff full and equal access to the place of
 9 public accommodation. *See Vogel v. Winchell's Donut Houses Operating Co., L.P.*,
 10 252 F. Supp. 3d 977, 983 (C.D. Cal. 2017); *Mayberry v. Von Valtier*, 843 F. Supp.
 11 1160, 1166 (E.D. Mich. 1994).

12 C. **Plaintiff’s Injunctive Relief Claims Should Be Dismissed As Moot.**

13 1. **Mootness Doctrine in ADA Accessibility Cases**

14 Under Article III of the United States Constitution, federal courts may only
 15 adjudicate actual cases or controversies where true adversarial interests give rise to a
 16 clear and concrete conflict. *Flast v. Cohen*, 392 U.S. 83, 96-97 (1968). In order to
 17 establish and maintain standing to bring suit, a plaintiff bears the burden of showing:
 18 (1) injury-in-fact, or the invasion of a legally protected interest, that is both (a)
 19 concrete and particularized and (b) actual or imminent; (2) a causal connection
 20 between the injury and the conduct complained of; and (3) a likelihood that a
 21 favorable decision will redress the wrong. *Lujan v. Defenders of Wildlife*, 504 U.S.
 22 555, 560 (1992). Mootness is a jurisdictional defect that can be raised at any time
 23 by the parties or the court *sua sponte*. *Parr v. Waianae L & L, Inc.*, 2000 U.S. Dist.
 24 LEXIS 7373 at *66 (D. Haw. 2000). To demonstrate that a case is moot, the
 25 defendant must show that the issues involved are no longer “live” or that the parties
 26 lack a legally cognizable interest in the outcome. *County of Los Angeles v. Davis*,
 27 440 U.S. 625, 631 (1979). The court cannot take jurisdiction over a claim to which
 28 no effective relief can be granted. *Id.* Moreover, “past exposure to illegal conduct

1 does not in itself show a present case or controversy... if unaccompanied by any
 2 continuing present adverse effects.” *Renne v. Geary*, 501 U.S. 312, 320-321 (1991).
 3 This requirement ensures that the courts are able to grant effective relief, rather than
 4 render advisory opinions. *Medical Soc’y of N.J. v. Herr*, 191 F. Supp. 2d 574, 581
 5 (D.N.J. 2002).

6 The law is well-established that a defendant’s remedial efforts will render a
 7 plaintiff’s ADA claim for injunctive relief moot. *See Gasper v. Marie Callender*
 8 *Pie Shops*, 2006 U.S. Dist. LEXIS 96929 at *4 (C.D. Cal. 2006) (“the only remedy
 9 available for a violation of the Americans with Disabilities Act under a private right
 10 of action is injunctive relief. Accordingly, if no ADA violations exist at the time the
 11 court is asked to provide injunctive relief, the ADA claim is moot because there is
 12 no basis for relief and there is nothing for the court to order the facility to change.”)
 13 For these reasons, courts routinely dismiss disability access claims as moot when
 14 defendants modify allegedly noncompliant barriers. *See, e.g., Paulick v. Starwood*
 15 *Hotels & Resorts Worldwide, Inc.*, 2012 U.S. Dist. LEXIS 101332 (N.D. Cal. 2012)
 16 (granting summary judgment in favor of Defendants where Defendants corrected the
 17 specific barriers listed in Plaintiff’s complaint); *Pickern v. Best W. Timber Cove*
 18 *Lodge Marina Resort*, 194 F. Supp. 2d 1128 (E.D. Cal. 2002) (granting summary
 19 judgment in favor of Defendant and finding that where Defendant made alterations
 20 to its facilities to remove the barriers of access, Plaintiff’s claim for injunctive relief
 21 under the ADA was moot); *Hubbard v. 7-Eleven, Inc.*, 433 F. Supp. 2d 1134, 1145
 22 (S.D. Cal. 2006) (Defendant repaired the ramp slope from the public sidewalk to the
 23 store entrance, which was too steep, thus mooting the ADA claim); *Vogel*, 252 F.
 24 Supp. 3d 977 (C.D. Cal. 2017) (granting summary judgment where the Plaintiff
 25 admitted that the barriers alleged in the Complaint were eventually removed,
 26 rendering his ADA claim moot.)

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2. **Plaintiff's Claims 1 and 2 are Moot.**

Plaintiff's claim for injunctive relief against Defendants is moot because the barriers alleged in Plaintiff's FAC that are on the Property (i.e., Claims 1 and 2 identified above) do not currently exist. Plaintiff alleged in his FAC that the two disabled parking spaces and access aisle located directly in front of the CVS Store had slopes that were too steep. Such conditions do not currently exist. Additionally, Plaintiff alleged that the plumbing underneath the restroom sink at the CVS Store was not properly wrapped. Such conditions also do not currently exist. The facts in support of this motion demonstrate that as to Defendants, the cause of Plaintiff's alleged injury is gone and not likely to return or reoccur. Thus, Plaintiff cannot demonstrate any entitlement to relief as to Claims 1 and 2.

Specifically, as to Claim 1, the two accessible parking spaces located directly in front of the CVS Store presently meet current ADA and California Building Code ("CBC") accessibility standards. Surface slopes of accessible parking spaces and access aisles shall not exceed a two percent slope in any direction. *See* 1991 Standards § 4.6.3; 2010 ADA Standards 502.4; 2016 CBC 11B-502.4. The cross slopes and/or running slopes of the two accessible parking spaces located directly in front of the CVS Store, and their attendant access aisle, presently range from 0.3% to 2.0%. [SUMF 18] (Declaration of Jeff Yankee ("Yankee Decl.") ¶5; Exhibit A to Yankee Decl.)

Additionally, as to Claim 2, the plumbing underneath the restroom sink in the CVS Store presently meets current federal and state accessibility standards. Water supply and drain pipes under sinks must be insulated to protect against contact. *See* 1991 Standards § 4.19.4; 2010 ADA Standards 606.5. The restroom sink pipes at the CVS Store are currently wrapped to protect against burning contact. [SUMF 19] (Yankee Decl. ¶6; Exhibit B to Yankee Decl.)

In light of the above, there is no need for this court to issue any injunctive relief as to Defendants because there is no reasonable possibility that Plaintiff will

1 be the subject of the discrimination alleged in his FAC by Defendants in the future.
 2 Plaintiff's claim for injunctive relief against Defendants under the ADA is moot.

3 D. **Plaintiff Cannot Prevail as to The Remaining Claims 3 and 4 –**
 4 **Other Entities' Properties**

5 Claims 3 and 4 identified above describe conditions that fall under the control
 6 of other entities. Claim 3 relates to accessible parking spaces located in front of the
 7 Icho Izakaya store. These parking spaces are located on property that is not owned
 8 or controlled by Defendants. Thus, Defendants have no ability to control any of the
 9 activities relating to it, including any alterations to its condition.

10 Claim 4 relates to an accessible parking space located directly in front of the
 11 East West Bank. This parking space is located on property that is not owned or
 12 controlled by Defendants. Thus, Defendants have no ability to control any of the
 13 activities relating to it, including any alterations to its condition. Additionally,
 14 Plaintiff filed the FAC identifying Gradiazio Investment Company as the owner of
 15 the property located at 5607 N. Rosemead Blvd., Temple City, California. [SUMF
 16 10] (ECF No. 34.) On January 7, 2019, Plaintiff's counsel and Gradiazio filed a
 17 stipulation to dismiss Gradiazio, which this Court granted on January 9, 2019.
 18 [SUMF 12] (*See* ECF No. 46.)

19 In *Pickern v. Pier 1 Imps. (U.S.), Inc.*, 457 F.3d 963, 966 (9th Cir. 2006), the
 20 Court of Appeals upheld judgment in favor of defendants where it was found that
 21 they did not own or control the land upon which the construction of a ramp was
 22 demanded.

23 For at least two reasons, Title III of the ADA requires that the
 24 Appellees in this case **control** the grassy strip of land in order to be
 25 subject to liability for failing to build a ramp over that land. First, the
 26 operative rule in Title III provides: "No individual shall be
 27 discriminated against on the basis of disability in the full and equal
 enjoyment of the goods, services, facilities, privileges, advantages, or
 accommodations of any place of public accommodation by any person
 who **owns, leases (or leases to), or operates** a place of public
 accommodation." 42 U.S.C. § 12182(a) (emphasis added).

28 *Id.* (emphasis added).

1 In *Hubbard v. Rite Aid Corp.*, 433 F. Supp. 2d 1150, 1169-1170 (S.D. Cal.
 2 2006), the Court denied Plaintiff's claim for injunctive relief where the requested
 3 barrier removal would have required alterations on property not owned or controlled
 4 by the Defendants.

5 The Court will not order Defendants to remove an architectural
 6 barrier on their own property which will create accessibility
 7 hazards on the adjacent property and the Court cannot order the
 8 Defendants in this case to alter the path of travel on property that
 Defendants do not own or operate. This Court can only order
 injunctive relief and Plaintiffs have not shown any effective
 injunctive relief is available...

9 *Id.*

10 As to Claims 3 and 4, Plaintiff's demands relate entirely to property that is not
 11 owned or controlled by Defendants. Plaintiff's demands for compliant parking
 12 spaces in front of the Icho Izakaya store and East West Bank are misdirected,
 13 targeting Defendants rather than the appropriate parties. Because Defendants do not
 14 own, operate, or control the areas on which these ADA-related alterations are
 15 demanded by Plaintiff, Defendants cannot be liable under Title III of the ADA and,
 16 as to Defendants, Plaintiff's Claims 3 and 4 must fail.

17 **IV. THE COURT SHOULD DECLINE TO EXERCISE SUPPLEMENTAL**
 18 **JURISDICTION OVER PLAINTIFF'S STATE LAW CLAIM.**

19 Pursuant to 28.U.S.C. § 1367(c), a district court has the discretion to decline
 20 to exercise supplemental jurisdiction over a state law claim where one or more of
 21 the following circumstances exist:

- 22 “(1) the claim raises a novel or complex issue of State law,
- 23 (2) the claim substantially predominates over the claim or claims over which
- 24 the district court has original jurisdiction,
- 25 (3) the district court has dismissed all claims over which it has original
- 26 jurisdiction, or
- 27 (4) in exceptional circumstances, there are other compelling reasons for
- 28 declining jurisdiction.”

1 Here, at least three of the four statutory grounds exist for this Court to decline
2 supplemental jurisdiction.

3 A. **The Dismissal of Plaintiff's ADA Claim Merits Dismissal of**
4 **Plaintiff's Remaining State-Law Claims.**

5 The Supreme Court has held that **if federal claims are dismissed before**
6 **trial, courts should decline to exercise supplemental jurisdiction over the**
7 **remaining state-law claims.** *United Mine Workers v. Gibbs*, 383 U.S. 715, 86 S.
8 Ct. 1130 (1966); *Schneider v. TRW, Inc.*, 938 F.2d 986, 993 (9th Cir. 1991); *see also*
9 28 U.S.C. § 1367(c). “In the usual case in which all federal-law claims are
10 eliminated before trial, the balance of factors to be considered under the pendent
11 jurisdiction doctrine – judicial economy, convenience, fairness, and comity – will
12 point toward declining to exercise jurisdiction over the remaining state-law claims.”
13 *See Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350, fn. 7 (1988).

14 Courts have properly and routinely declined to exercise supplemental
15 jurisdiction over related state-law claims once the ADA cause of action has been
16 dismissed. *Id.*; *see also Rodgers v. Chevys Restaurants, LLC*, 2015 U.S. Dist.
17 LEXIS 22164 at *11 (N.D. Cal. 2015); *Ramirez v. Lococo's Cucina Rustica*, 2018
18 U.S. Dist. LEXIS 5447 (N.D. Cal. 2018). For example, in *Oliver v. Ralphs Grocery*
19 *Company*, the Ninth Circuit upheld the district court's decision to decline
20 supplemental jurisdiction over the plaintiff's state-law access claims once his ADA
21 claim had been dismissed, stating that due to the balance of the factors of judicial
22 economy, convenience, fairness, and comity, the district court properly declined to
23 exercise supplemental jurisdiction over Plaintiff's state law claims after granting
24 summary judgment in favor of Defendants on Plaintiff's ADA claim. *Oliver*, 654
25 F.3d 903 at 911.

26 Here, the granting of Defendant's Motion for Partial Summary Judgment
27 warrants a dismissal of Plaintiff's state-law claim, as such a dismissal would
28 promote the values of fairness and comity. Written discovery has been propounded

1 by Defendants only and no depositions have been taken. There have been no
 2 noticed site inspections. Plaintiff cannot claim he is deeply invested in litigating in
 3 this forum. Furthermore, “[t]his is thus not a situation in which significant resources
 4 were expended in federal court and dismissal would require a new judge to develop
 5 familiarity with a complex factual situation.” *Rogers v. Irvine Co. LLC*, 2014 U.S.
 6 Dist. LEXIS 86620 at *2 (C.D. 2014). Similarly, here, this is not a situation where
 7 familiarity with complex factual situations has already been developed. There can
 8 be no showing of unusual or extraordinary circumstances to justify retaining
 9 jurisdiction over the state law claims. Accordingly, this Court should decline to
 10 exercise supplemental jurisdiction under 28 U.S.C. § 1367 over Plaintiff’s
 11 remaining state law claim.

12 B. **Plaintiff’s State Law Claims Substantially Predominate Over The**
 13 **ADA Claim.**

14 Courts have long recognized that state law claims for monetary damages
 15 substantially predominate over claims for injunctive relief under the ADA. *See*
 16 *Gunther v. Lin*, 144 Cal.App.4th 223, 256 (2006) (“state law claims have become
 17 the tails that wag the dog of federal ADA litigation in California”). The Supreme
 18 Court has indicated that where “state issues substantially predominate, whether in
 19 terms of proof, of the scope of the issues raised, or of the comprehensiveness of the
 20 remedy sought, the state claims may be dismissed without prejudice and left for
 21 resolution to state tribunals.” *Gibbs*, 383 U.S. at 726-727. (While *Gibbs* is a pre-
 22 section 1367(c) case, the Ninth Circuit has indicated that *Gibbs* informs a section
 23 1367(c) analysis. *See Acri v. Varian Assocs, Inc.*, 114 F.3d 999, 1001 (9th Cir.
 24 1997).)

25 Here, the statutory damages available to Plaintiff under the Unruh Act
 26 substantially predominate over the injunctive relief available to Plaintiff under the
 27 ADA. Plaintiff seeks a minimum of \$4,000 in statutory damages. Under the ADA,
 28 Plaintiff is only entitled to injunctive relief and attorneys’ fees. Thus, given the

disparity in available remedies, the Court should find that Plaintiff's remaining state claim substantially predominates over his federal claim.

C. **Plaintiff's State-Law Claims Raise Novel and Complex Issues of State Law.**

The passage of Senate Bill 1186 in 2012 presents additional novel issues of state law. Among other things, this law codified new procedural requirements for disability discrimination lawsuits, including pre-litigation demands for money and the veracity of complaints. As amended, California Code of Civil Procedure §425.50 states, in relevant part:

(a) An allegation of a construction-related accessibility claim in a complaint, as defined in subdivision (a) of Section 55.52 of the Civil Code, shall state facts sufficient to allow a reasonable person to identify the basis of the violation or violations supporting the claim, including all of the following:

(1) A plain language explanation of the specific access barrier or barriers the individual encountered, or by which the individual alleges he or she was deterred, with sufficient information about the location of the alleged barrier to enable a reasonable person to identify the access barrier.

(2) **The way in which the barrier denied the individual full and equal use or access, or in which it deterred the individual, on each particular occasion.**

(3) **The date or dates of each particular occasion** on which the claimant encountered the specific access barrier, or on which he or she was deterred.

(b) **A complaint** alleging a construction-related accessibility claim, as those terms are defined in subdivision (a) of Section 55.3 of the Civil Code, **shall be verified** by the plaintiff. A complaint filed without verification shall be subject to a motion to strike.

(c) Nothing in this section shall limit the right of a plaintiff to amend a complaint under Section 472, or with leave of the court under Section 473. However, an amended pleading alleging a construction-related accessibility claim shall be pled as required by subdivision (a).

(emphasis added).

Plaintiff's FAC is deficient under §425.50 in the following ways: (1)

Plaintiff's complaint is not verified; (2) Plaintiff failed to specify the date he

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1 allegedly encountered barriers; (3) Plaintiff failed to state the manner in which the
2 alleged condition denied him access on a particular occasion.

3 While state pleading standards do not apply in federal court, (*Oliver v. In-N-*
4 *Out Burgers*, 286 F.R.D. 475, 477 (S.D. Cal. 2012), the new requirements were
5 intended as a *prerequisite* to the award of *state law* damages. Permitting a plaintiff
6 to litigate the only remaining claim in this forum, which is a state law claim, while
7 avoiding the requirements imposed on the litigating of that very state claim in state
8 court would not only be contrary to California’s legislative intent, but would give
9 Plaintiff license to avoid limitations imposed on the very statutory scheme upon
10 which he bases his claim. Here, allowing the residual state claim to be litigated
11 would allow Plaintiff to “pick and choose” selective portions of the statute and
12 ignore the rest.

13 Accordingly, the Court should decline to exercise supplemental jurisdiction
14 pursuant to Plaintiff’s state law claim, as Plaintiff’s UCRA claim raises a novel and
15 complex issue of state law.

16 D. **State Court Provides a More Efficient Forum for Plaintiff’s State**
17 **Law Claims**

18 California Civil Code §52.2 gives the California Small Claims Court specific
19 jurisdiction of disabled access claims under Civil Code §52 and §54.3.

20 Additionally, California *Code of Civil Procedure* §1033(b) creates strong
21 incentives for plaintiffs to file in the most economical level of California’s tiered
22 jurisdictional classifications (Small Claims [Limited Civil under \$10,000], Limited
23 Civil [under \$25,000], and Unlimited Civil [over \$25,000.]). *See* C.C.P. §1033(b)
24 (limiting or eliminating an award of costs where a lawsuit is “over-filed” and the
25 plaintiff fails to obtain a damage award above the jurisdictional minimum). Given
26 the existence of this “tiered” system of litigation in state court, it would likely be
27 less costly to the parties if Plaintiff’s state-law claims are litigated in state court.

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1 **V. CONCLUSION**

2 For the reasons stated above, Defendants respectfully request that the Court
3 GRANT its Motion in its entirety and decline to exercise supplemental jurisdiction
4 over Plaintiff's remaining state law claim.

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6 DATED: August 30, 2019

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